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NO. 175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,
Petitioner,
vs.
STATES MARINE LINES, INC., a corporation,
Respondent,
vs.
GULF FLORIDA TERMINAL COMPANY, a corporation,
Respondent.

On Petition for A Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit below, *Moragne v. States Marine Lines, Inc., et al.,* (Pet. App. 1-2)[1] is reported at 409 F.2d 32 (5th Cir. 1969). The preceding opinion of the Supreme Court of Florida, answering the question certified by the United States Court of Appeals for the Fifth Circuit, *Moragne v. States Marine Lines, Inc., et al.,* (Pet. App. 3-15) is reported at 211 So.2d 161 (Fla. 1968).

[1] "(Pet.App.)" refers to the Appendix to the Petition for a Writ of Certiorari filed in this cause.

JURISDICTION

In its pertinent aspect, this litigation began when Petitioner, a widow, filed suit under the Florida Wrongful Death Act, Florida Statutes, §768.01, seeking money damages for the death of her husband from a shipowner. (Pet. App. 4). This Wrongful Death Act claim was set forth in two counts, the first alleging negligence, the second alleging unseaworthiness. (Pet. App. 4). On motion of the Respondent, States Marine Lines, Inc., the shipowner, the District Court dismissed the count based on unseaworthiness for the reason that such a cause of action was not within the contemplation of the Florida Wrongful Death Act. (Pet. App. 4). Leave to appeal interlocutorily was granted by the Fifth Circuit. Thereafter, the Fifth Circuit certified to the Supreme Court of Florida the following stipulated question (Pet. App. 1):

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

All the parties, including Petitioner, agreed that the question raised in the certificate was a question controlled and governed by the state law of the State of Florida. Thus, petitioner stated in its main brief to the Fifth Circuit (Brief of Appellant, p. 4):

> "The sole issue before this Court is an interpretation of the Florida Wrongful Death Act, F.S. 768.01."

And, Petitioner further stated in its reply brief (Reply Brief of Appellant, p. 3):

> "We readily agree with the Appellee that the Federal Courts must take the State Law as they find it, including its limitations. This is precisely the point the Appellant has been arguing. The State Law obviously *does* incorporate this action. The Statute was intended to incorporate this action, and this Court should be bound by the State Law."

Thereafter, the Supreme Court of Florida rendered its decision (Pet. App. 3-15) answering the certified question in the negative, after which the Fifth Circuit entered its decision affirming the District Court. (Pet. App. 1-2).

The present Petition for a Writ of Certiorari seeks review of that decision of the United States Court of Appeals for the Fifth Circuit. The Petitioner contends *now* that the Fifth Circuit erred in consulting and applying state law to determine whether a suit under the Florida Wrongful Death Act may be predicated on allegations of unseaworthiness. The Respondents[2] submit, and we will argue in the "Argument" portion of this brief, that the Petitioner has demonstrated no predicate for the assumption of jurisdiction by this Honorable Court in this cause. We submit that in applying state law, interpreted by the Supreme Court of Florida in this very case, the Fifth Circuit followed the precisely applicable pronouncements of this Court.

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[2] This Brief in Opposition is submitted on behalf of the Respondent, States Marine Lines, Inc., and the Respondent, Gulf Florida Terminal Company. The Respondent States Marine Lines, Inc., was the shipowner sued by Petitioner in the first instance. States Marine Lines, Inc. thereafter filed a Third Party Complaint against Gulf Florida Terminal Company, a stevedoring corporation, seeking indemnity for any liability imposed upon States Marine Lines, Inc. However, the positions of the two Respondents regarding the present Petition for Certiorari are identical and therefore they submit this brief jointly.

QUESTIONS PRESENTED

The Petitioner states, as the questions presented, the following (Petition, page 4):

"I) Does Article III, Section 2 of the Constitution of the United States require the uniform application of substantive admiralty law to actions for wrongful death brought under State Wrongful Death Acts arising out of maritime torts committed on navigable waters of the United States within the territorial jurisdiction of the states.

II) Does the uniformity of admiralty and maritime law as contemplated by Article III, Section 2 of the Constitution of the United States and federally developed maritime principles, in cases arising out of deaths occurring on navigable waters of the United States, prohibit the application of substantive state common law principles which are in conflict with substantive admiralty law.

III) Does the application of substantive state common law principles, which are in conflict with substantive federal admiralty principles, in determining the rights and liabilities of a longshoreman, killed upon navigable waters of the United States within the territorial jurisdiction of the State of Florida, contravene the provisions of Article VI of the Constitution of the United States."

We respectfully observe at this juncture that the Petitioner did not raise or present these questions in the Fifth Circuit, or in the Supreme Court of Florida, until after the unfavorable decision of the Florida Supreme Court. Prior to that time Petitioner strongly urged the application of State law "including its limitations".

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions deemed to be involved by Petitioner (Fla. Stat. §768.01; U.S. Const., Art. III, §2; U.S. Const., Art. VI) are set forth in the Petition at pp. 5-6.

STATEMENT OF THE CASE

The underlying facts and procedural history are adequately set forth in the Petition at pp. 6-9. In addition, the Respondents respectfully refer to the matter recited herein under the "Jurisdiction" heading.

ARGUMENT

Under this heading we will set forth the reasons for denying the writ in this cause. The fundamental basis of Respondents' position is that the rule applied by the Fifth Circuit, at the instance of all the parties, was in faithful accord with controlling law as announced by this Court and that it contravenes no federal constitutional requirement. Further, we submit that the Petitioner may not now object to the application of state law and state imposed limitations in this case since Petitioner urged and invited such application in the Fifth Circuit. We will argue these matters under separate subheadings below.

I. THE PETITTIONER AFFIRMATIVELY INVITED THE FIFTH CIRCUIT TO APPLY STATE LAW AND SHOULD NOT NOW BE HEARD TO COMPLAIN THAT STATE LAW WAS APPLIED.

Petitioner argued to the Fifth Circuit that Florida law, "including its limitations", should be applied in determining whether unseaworthiness allegations could support a suit under the Florida Wrongful Death Act. The Fifth Circuit and the parties recognizing that Florida law controlled, and there being no decision of the Florida Supreme Court on the point, the question was accordingly certified to the Florida Supreme Court. The Florida Supreme Court rendered its decision holding that the Florida Wrongful Death Statute does *not* contemplate an action predicated on the maritime doctrine of unseaworthiness. Now Petitioner wishes to "change horses" and contend that Florida law should not be followed. We submit that Petitioner should not be permitted to attack by Petition for Certiorari the very rule

Petitioner accepted and urged below. The rules governing the proper scope of appellate review indicate clearly that a litigant will not be permitted to invite and induce an inferior tribunal to adopt a particular rule or theory and then contend on appeal that such rule or theory should not have been adopted. See, e.g., *Safeway Stores v. Oklahoma Retail Groc. Asso.*, 360 U.S. 334, 79 S. Ct. 1196, 3 L. Ed.2d 1280 (1959); *Autrey v. Williams and Dunlap*, 343 F.2d 730 (5th Cir. 1965); *Holm v. American Ship Building Company*, 276 F.2d 201 (6th Cir. 1960), cert. den. 364 U.S. 819, 81 S. Ct. 53, 5 L. Ed.2d 50 (1960); *Corbin v. Baltimore & O. R.R.*, 234 F.2d 78 (6th Cir. 1956); *Williamson v. Weyerhaeuser Timber Co.*, 221 F.2d 5 (9th Cir. 1955).

The Petitioner presented the question to the Fifth Circuit as simply a question of interpretation of a Florida Statute. No provisions or requirements of the United States Constitution were raised or mentioned by Petitioner prior to the entry of the decision of the Florida Supreme Court. Only after that decision, which was unfavorable to Petitioner, did Petitioner raise any constitutional argument. In these circumstances, the statement of this Court in *Louisville & N. R. Co. v. Louisville*, 166 U.S. 709, 715-716, 17 S. Ct. 725, 41 L.Ed. 1173 (1897), is compelling:

> "The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. . . . It is now said that as the proper construction of the statute was definitely settled by the court of appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract . . . and because it denied the equal protection of the laws in contravention of the 14th Amendment, al-

though no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient."

In sum, we submit that the questions sought to be raised by Petitioner here were not properly preserved below, and, indeed, that the portion of the Fifth Circuit decision complained of here was invited and requested by Petitioner in its presentation of the appeal to the Fifth Circuit. Orderly judicial administration requires that Petitioner be bound by the position taken below.

II. THE DECISION SOUGHT TO BE REVIEWED CONTRAVENES NO FEDERAL CONSTITUTIONAL REQUIREMENT.

Under this subheading we assume, for purposes of argument only, that the questions raised by the Petitioner were properly preserved below. Even so assuming, we submit that the decision of the Fifth Circuit contravenes no federal constitutional requirement. Indeed, the decision is in keeping with controlling law.

There is no federal or maritime cause of action for death available to Petitioner. The Fifth Circuit simply held that since Petitioner was seeking to enforce a cause of action created by a Florida statute, there being no maritime or federal cause of action available at all, she would have to take the Florida cause of action subject to the limitations recognized by Florida as a part of the statute. In reaching this decision the Fifth Circuit was simply following the clear mandate of this Court. The often cited decision of this Court in *The "Tungus" v. Skovgaard*, 358 U.S.

588, 79 S. Ct. 503, 506, 3 L.Ed. 2d 524 (1959), restated the principle emphatically announced as early as 1886. In *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358 (1886), this Court said (119 U.S. 214):

> "[I]f the admiralty adopts the (State Wrongful Death) statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

We note Petitioner's present contentions that *Tungus* should now be overruled and replaced by the idea that the Courts in the judicial administration of state wrongful death acts (including state courts administering their own acts) should disregard the state-imposed limitations upon which enactment was conditioned; and that federal maritime principles should be imported into these acts even though they be contrary to the express intent of the enacting legislatures or the judicial interpretations of the acts. But this Court has for almost a century refused so to distort the solemn enactments of the various state legislatures or to disregard the considered interpretative decisions of the state high courts charged with the responsibility of interpreting state statutes. We submit that the principles announced by this Court in *Tungus* and *Harrisburg* were well reasoned and are deserving of continued application. It is worthy of note that the principle stated in *Tungus* has, according to our research, been followed at least 35 times by this Court, courts of appeals and district courts. We set forth a list of these decisions in the "Glossary" at the end of the brief.

Yet Petitioner urges here the wholesale repeal of this imposing body of case law. Such a change based on the suggested necessity of rigid uniformity in maritime law, is, we submit, entirely unjustified.

First, the application of state law in the present circumstances does not touch, affect or modify maritime law in any way. Maritime law simply does not extend into the area of non-seaman fatalities in state waters. Therefore there is no maritime law with which the normal administration of litigation under the Florida Wrongful Death Act might conflict. It should be stressed here, as in *Tungus* (79 S. Ct. at 507), that Congress, in enacting the maritime legislative pattern, has studiously withheld the operation of federal maritime law from the area of non-seaman state waterway fatalities. This field was left to the states exclusively.

Second, and perhaps most important, Petitioner's contention that maritime law demands absolute uniformity is unsound. Here we assume, for purposes of argument only, that maritime law is involved at all. This Court's most recent pronouncement on a related point shows that Petitioner's "Uniformity" argument is without merit. Thus, in *Rodrique, et al. v. Aetna Casualty & Surety Co.*, No. 436, October Term 1968, June 9, 1969, 37 Law Week 4505, this Court was called upon to determine the applicability of unique state law concepts, foreign to maritime law, to litigation arising from fatal accidents on a "Texas Tower" located on the high seas outside the territorial waters of Louisiana. After noting that the maritime statute (Death on The High Seas Act) was not available, this Court concluded it was altogether appropriate to apply all the provisions of the state law including those different from maritime law.

Moreover, unique state legal principles have historically been applied in federal legal schemes. For example, litigation under the Public Vessels Act (46 U.S.C. §§781 et seq.), which has a clear maritime flavor,

is in no such need of rigid uniformity that local state law principles cannot be applied. See, e.g., *Allen v. United States*, 338 F.2d 160 (9th Cir. 1964). Further, *Fonseca v. Prann*, 282 F.2d 153 (1st Cir. 1960), teaches that maritime law itself is so resilient that the local substitution of a workman's compensation remedy for Jones Act death benefits was acceptable. An argument similar to Petitioner's has been made to this Court in the context of "uniformity" as to employees and non-employees under the Federal Employer's Liability Act. The argument was rejected. See, *Crane v. Cedar Rapids & Iowa City Ry. Co.*, No. 791, October Term, 1968, May 20, 1969, 37 Law Week 4443.

Finally, Petitioner's position here cannot survive consideration of the terms of the Jones Act vis-a-vis death benefits and this Court's decision in *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L.Ed. 2d 199 (1968). In *Gillespie* a seaman had been fatally injured in Ohio waters because of alleged "unseaworthiness". A suit was brought under the Ohio Death Statute based on unseaworthiness. This Court held that the Jones Act (46 U.S.C. 688) was the exclusive remedy and noted that the Jones Act provided for death benefits *only upon proof of negligence*. Petitioner's entire position here is that the recovery of death benefits based on unseaworthiness is absolute dogma sacred to maritime law. Yet the Jones Act allows death benefits to a *seaman* (Petitioner's decedent was a shore-based longshoreman) only in case of negligence. Thus, the Florida Wrongful Death Statute is being assailed here for imposing precisely the same requirement as that imposed by the most prominent federal statute in the maritime field relating to personal injury and death.

SUMMARY

Under long-established rules Petitioner may assert claims for the death of her decedent upon exactly the same grounds as might be asserted in connection with any death occurring in Florida. Until the Florida Supreme Court's decision was announced Petitioner took the position that the question was simply one of Florida law. Only after the adverse decision by the Florida Supreme Court did Petitioner suggest the possibility of constitutional questions. There is no general maritime law covering death of a non-seaman in state waters. For this reason there can be neither state-federal conflict nor variation in remedy from state to state beyond what Congress and this Court have for generations accepted as proper.

Petitioner's three "questions presented" are in fact but one question stated in three slightly different forms. They come to this:

> "Will this Court, at this time, overrule its own decisions, repeal generations of precedent, disregard the clear intent of Congress that recovery for deaths of nonseamen in state waters be regulated by state law, and ignore or override the Florida Supreme Court's interpretation of the Florida Statute upon grounds which are contrary to controlling legislative and judicial precedent and which were not timely raised in the Courts below."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to Charles Jay Hardee, Jr., Esquire, of Hardee, Ott & Hamilton, 101 East Kennedy Boulevard, Tampa, Florida 33602, Attorney for Petitioner, to the Clerk of the Court of Appeals for the Fifth Circuit, and to the Clerk of the Supreme Court of Florida this_____day of July, 1969.

By: _____
Attorney

GLOSSARY

United States Supreme Court

Goett v. Union Carbide Corp., 361 U.S. 340, 342, 343, 80 S.Ct. 357, 358, 359, 4 L.Ed.2d 341 (1960).

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Aldredge v. States Marine Corp., 265 F.2d 554 (9th Cir. 1959).

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Hunter v. Dampsk A/S Flint, 279 F. Supp. 701, 702 (E.D. Mich. 1967).

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Helgesen v. U.S., 275 F. Supp. 789, 791 (S.D.N.Y. 1966).

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